THE THEORY OF THE NATURE OF THE SUFFRAGE

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The essential necessity and inherent importance of a broad constructive political theory is coming once again to be recognized. Over-emphasized and misapplied in the eighteenth century, a natural reaction against political philosophy characterized the nineteenth century. The swing of the pendulum is carrying us back in this present time once more to the appreciation of the value and importance of rational, synthetic generalizations regarding the state. The analytical, dispersive and monographic method of historical and political studies achieved great and lasting results, but today the general view, the broader vision, the deeper meaning, the larger unity are receiving increasing attention. We shall not abandon the positive results in scientific accuracy and wealth of data which detailed studies of institutions have afforded, but we shall insist more and more in the future upon interpretations which shall link together the results of scholarly research and provide us with a more profound and comprehensive knowledge of the truth. Not a revival of the *a priori* speculations of the eighteenth century, but a thoroughly inductive and scientific theory of the state is the highest aim and purpose of twentieth century political science.

The political science of the nineteenth century was chiefly interested in public law. It was the age of constitutionalism *par excellence*. The mechanism of government required elaboration and perfection. That work has not been completed, but it has progressed so far that we may begin to pause at intervals between the framing of new constitutions and administrative systems to ask ourselves what is the meaning of our work, upon what general principles are we proceeding, what signifies this institution, that tendency. That public law is at all times closely connected with political theory is more than obvious. The two have in all ages reciprocally influenced each other. The great decisions of our supreme court are all instinct with political theory. But this theory, as that which appears in formal treatises on political science, contains little that was not derived directly from the preceding century. Out-

worn and untenable dogmas like popular sovereignty, the separation of powers, and natural rights still flaunt themselves unchallenged in serious political discussions. Even the social compact is not dead but continues consciously and unconsciously to influence the form which current political argument takes. While public law was experiencing the most wonderful and far-reaching development to meet the requirements of rapidly changing social and economic conditions, political theory remained almost stationary and today is altogether inadequate to explain and interpret the deeper meaning and significance of the modern state and its governmental organization. It behooves the earnest student of political science to restore political theory to the position of honor to which it is entitled by making it once again exercise not merely an adequately interpretative, but also a positively constructive function with respect to political institutions.

At the present time no phase of our constitutional government is undergoing such fundamental transformation or experiencing so important a development as the electorate. The changes are both structural and functional. Such proposals as those for woman suffrage, proportional and minority representation, the representation of interests, and those for plural and weighted voting, alter in essential particulars the structure of the electorate. In such movements as those for the initiative, the referendum, the recall, and the recall of judicial decisions, we encounter other measures which would extend the functions of the electorate far beyond anything that was thought possible by the most imaginative and sanguine reformer even a few years ago. The short ballot movement seeks, in another direction, to limit, in order to make more effective, the function of the electorate. Ballot laws and corrupt practices acts are inspired by the need for improving the methods by which the electorate performs its work. In these various proposals we are confronted with the most serious political problems of the day. Political scientists are probably devoting more attention to this field of public law than to any other. Ought not their work to be checked, guided and illuminated by a broad constructive theory of the nature of the suffrage? It is not the purpose of this paper to offer such a theory; the writer will be more than satisfied if he shall succeed in drawing attention to the importance of the subject, and in preparing the ground by a historical and critical examination of the various theories which have found acceptance in the past and which continue at present to command support.

Five distinct theories of the suffrage, arising in the peculiar circum-

stances and conditions of different epochs of governmental development, have been utilized to explain or justify various electoral systems. These are (1) the primitive tribal theory which reached its fullest and most perfect development in the city-state of antiquity, that voting is a necessary attribute of membership in the state, that the suffrage is an adjunct and function of citizenship; (2) the later feudal theory, that the suffrage is an adjunct of a particular status, generally tenurial in character—a vested privilege, usually attached to the possession of land; (3) the theory of the early constitutional regime, that voting is an abstract right, founded in natural law, a consequence of the social compact, and an incident of popular sovereignty; (4) the theory which commands support from the majority of political scientists at the present time—the scientific theory of the suffrage—that voting is a public office, a function of government, that the electorate is an organ of the state like the legislature or the executive; and (5) the ethical theory of the suffrage, which, by no means dominant at present, bids fair to display increasing strength in the future, that voting is an important—indeed a necessary and essential—means for the development of individual character, for the realization of the worth of human personality. So far from the transitions from one theory to another being sharply marked, the changes have been most gradual, and with the general acceptance of one theory others have not disappeared but have continued to modify, in some degree, the conclusions which a strict application of the dominant theory would enforce. The practical result frequently reflects a compromise between theories in their essence incompatible. These several concepts display very clearly Vico's law of spiral progression. Taken together they certainly constitute a series in a line of evolution. But they likewise follow the law of action and reaction. The first, third and fifth are broad, equalitarian and inclusive in character; the second and fourth are more narrow, discriminating and preferential. At present all five of these theories can be clearly discerned influencing to greater or less extent political action and discussion. The theoretical basis for discussion and legislation concerning the electorate is a confused medley of these several conceptions.

The earliest theory of the suffrage is that which is found generally among primitive peoples—at least among those races from which our western civilization is derived. The Greeks perfected and developed, but never outgrew, this early tribal conception of the suffrage. The city-state of antiquity was looked upon as a natural and necessary

phenomenon. In saying that man is a social animal, Aristotle meant much more than that he was merely gregarious. To him and to the Greeks generally, membership in the state was as natural, essential, and necessary a relationship as membership in the family. The state was the expanded family; it had evolved out of the family. In Sparta, indeed, it completely extinguished the family. So far from being an artificial relationship, citizenship was, like parenthood or sonship, thoroughly normal, rooted in nature. It was almost always inherited, very seldom conferred. It was consequently narrow and exclusive. Religion afforded at the same time its test and its sanction. Sharing the worship of the city and performing the rites of religion were the marks of citizenship, and this implied participation in all civil and political acts. In Sparta to cease to join in the public meals, which were the principal religious ceremony, meant ceasing to be a citizen, and ceasing to share in the work of government. In Athens a man could be tried and condemned for incivism, for disaffection to the state. Ostracism was not a punishment for crime but a means of eliminating an individual member who for any reason had become inimical or dangerous to the state. There was no separation or opposition between the state and the individual. It is as erroneous to speak of the individual being completely subordinated to the state in the city of antiquity as it is to describe the state as merely a means for individual self-realization. The ancient city was neither socialistic nor individualistic. The state and the individual were identified. No thought of a difference of interest, or conflict of purposes, ever entered the mind of the man of classic antiquity. The individual realized himself only in and through the state. The state existed for the individual, the individual for the state. There was absolutely no sphere of individual rights to be asserted and defended as against the state. Such a thing as a bill, or declaration, of rights would have been wholly incomprehensible. Voting on questions of policy or enacting administrative ordinances in the assembly, electing magistrates, serving in the jury courts and performing the functions of magistrate were never looked upon as the exercise of rights. They were simply part of the life of the city in which all citizens shared, as they shared in the religious worship or in the dramatic representations of the theater. No citizen was or could be indifferent to these important interests. No one could remain neutral in the discussion or determination of matters of the highest import to all and each. Thus there was no question of electoral qualifications, for all citizens naturally and necessarily participated in government. Aristotle discusses the

question of who should be citizens, and holds the view that artisans and tradesmen, being incapable of virtue, i. e., of full and balanced manhood, are unable to be citizens. They ought not to be admitted to membership in the state for the same reason that slaves and chattels cannot share in the civic life. But this is a question of membership in the state, not of rights or of qualifications for the exercise of governmental powers. There is no thought of differentiating between citizens. The suffrage is not an abstract right, nor a vested privilege, nor a governmental office. It is merely a function of citizenship. After the democratic revolutions, which mark important epochs in the history of both the Greek and Roman city-state, the basis of government becomes less religious. A new principle, *τὸ κοινόν* in Greece, *res publica* in Rome, takes the place of the will of the gods as the determining principle. Government becomes in consequence democratic. The citizens in their collective capacity are recognized as the best judges of what is for the general weal and their functions are consequently enlarged. Much that was formerly left to the auspices and the oracles is now determined by the public assembly. But there is no change in the fundamental conception of voting as an inherent and necessary function of citizenship.[1]

This theory of the suffrage is, in essential respects, identical with that of the Germanic peoples of the early middle ages, though these did not develop it to the same point of perfection which it reached in the city-state of classical times. Participation in the *folkmoot* was an adjunct of membership in the tribe. Differences in rank and social status existed, but such distinctions involved no political inequality. In the national assembly all freemen appeared in arms and proposals were made by the chieftains or men of eminence. Opposition was expressed by loud shouts; assent by the shaking of spears or the clash of arms. All members of the tribe took part. As in the city-state, voting was an attribute of membership in the tribe, a function of citizenship.[2] The self-governing city-states of medieval and renaissance Italy, which in other respects bear so close a resemblance to the city-state of antiquity, reflect the same general theory of the suffrage. Citizenship, which was hereditary in certain families and was thus narrow and exclusive, carried with it *ipso facto* the right to share in the governing powers. In all of these communities the only qualification for the suffrage was membership in the state.[3]

[1] On the theory of the suffrage in the city-state of antiquity, cf. Fustel de Coulanges, *The Ancient City*, bk. iii, chs. xii, xvii; bk. iv, ch. ix.

[2] Tacitus, *Germania*, ch. 11, in Stubbs, *Select Charters*, pp. 56, 57.

[3] Symonds, *Renaissance in Italy: The Age of the Despots*, ch. iv.

This theory, while generally superseded in our own times, has continued to exercise some influence upon our ideas of the suffrage. Citizenship is still a qualification for voting, though it is no longer the sole or all-sufficient test. The two ideas of the suffrage and citizenship, which by modern theories ought to have no relation with each other, are generally more or less closely connected, if not confused. Our naturalization laws, and the proposals for higher qualifications for admission to citizenship, proceed from the principle that the electorate should be safeguarded from an infusion of unfit foreigners. Instead of directly establishing adequate educational and moral requirements for voting, applicable to citizens and aliens alike, we seek to accomplish the same end by the indirect means of limitations on naturalization. It is true that a few of our states admit to the suffrage aliens who have declared their intentions of becoming citizens, but even this is generally viewed as a questionable practice. The notion that the suffrage is an adjunct of citizenship still holds sway. Would we not be wiser to recognize at once that citizenship is no security for the proper performance of the electoral function, as alienage is no evidence in itself that a person may not exercise that function wisely? Ought we not to admit to our citizenship all aliens whom we can safely admit to the country, upon satisfactory evidence that they really desire to throw their lot in with us; and then establish such qualifications for the suffrage, entirely independent of citizenship, as are necessary to make the electorate a fit instrument to perform the functions with which it is invested?

The second theory of the suffrage is the product of the later middle ages. The political theory of this period has not received the consideration by English and American scholars to which its importance entitles it. The stage of political evolution, which continental students characterize as that of the "estates state," has been neglected by Anglo-Saxon writers, who erroneously treat English constitutional development as following a line of its own, essentially different from that which government took upon the continent. It is true that special conditions and circumstances produced somewhat different results in particular details in England, but these have been exaggerated into an essential difference in the main line of progression. English constitutional history is treated as *sui generis*, as having little in common with continental history. In fact, government in England and upon the continent passed through the same important stages of evolution. There was an "estates state" in England, which was in essential attributes identical with the "estates state" of France and Germany. In England the

period precedent to the Yorkist-Tudor absolutism has been looked upon as in essence identical with the modern constitutional state. The Tudor regime, instead of being treated as a necessary and essential stage in the evolution of government, is viewed as an interruption, a temporary retrogression, in the normal development of political institutions. The significance of absolute monarchy, as a necessary condition to the subsequent development of constitutional government, is totally lost sight of, and connections between the modern constitutional state and the medieval "estates state," which are merely historical, are elevated into legal identities. We continually read back into the pre-Yorkist era our own ideas of balanced constitutional government, ministerial responsibility, the legal omnipotence of parliament, popular representation, and the political supremacy of the electorate. Such ideas, which are the heart and substance of modern constitutionalism, were as foreign to the thoughts of medieval England as they were to the thoughts of medieval France or Germany. They all imply a recognition of the sovereignty of the state which was only attained through the agency of absolute monarchy. The "estates state" was a regime in which sovereignty had not yet become established. The modern conception of the state as a juristic personality, exercising a complete supremacy within the confines of its territory and absolutely independent of external control, was the product of monarchical absolutism. In the place of this fundamental notion, the "estates state" displays the aspect of several corporate bodies within the state contending among themselves for power and supremacy. The "estates" were not representatives of the people. There was no united and common people who could be represented. The two houses of parliament in the pre-Yorkist era, as similar institutions upon the continent, were not organs of government formulating and executing the will of a sovereign state; they were rather corporate bodies seeking to further, either in opposition or union, their own peculiar and special interests and the enhancement of their own power and authority. The house of lords was not an organ of government or of the state, but the organ of the corporate aristocracy. The house of commons was the organ of the associated "communes" and the corporate landed interest of the country. Parliament was the "states general" of England—the assembly of the various corporate estates of the realm.

What was the theoretical basis of the suffrage by which members were chosen to the house of commons in England, to the states general in France, and to similar bodies elsewhere in Europe, before absolutism

became dominant and such assemblies either ceased to exist entirely or became mere tools and instruments for despotic power? The right to choose members of these bodies rested upon exactly the same basis as the right of the nobles to be summoned in person to the house of lords or the assembly of the notables. Voting was an adjunct of a certain status; it was patrimonial in character, a privilege which attached to the status of tax-payer, or freeman, or burgess, or potwalloper, or forty-shilling freeholder. It was generally, if not always, connected with the possession of land and was thus tenurial in character. Often women who possessed the status had the electoral privilege, just as noblewomen frequently had the right of being represented by proctors in the estates of the nobility. In choosing members of parliament, the elector was not exercising, as in the city-state of antiquity, a function of citizenship; nor was he performing a public governmental office; nor realizing an abstract right. The product of the medieval "estates state," and rooted deep in the peculiar conditions of that regime, this vested privilege theory of the suffrage, nevertheless, by no means disappeared with the establishment of the modern constitutional state, but has continued down to our day to exercise a considerable influence upon the law governing the electorate. We shall observe how this theory received a clear and forcible expression in the discussions of the council of the Commonwealth army in 1647. A good statement of it is found in the opinion of Chief Justice Holt in the case of Ashby vs. White (1704) in which he says: "The election of knights belongs to freeholders of the counties, and it is an original right vested in and inseparable from the freehold, and can no more be severed from their freehold than the freehold itself can be taken away. . . . . As for citizens and burgesses, they depend on the same right as the knights of shires, and differ only as to the tenure, but the right and manner of their election is on the same foundation."[4]

This theory was evidently the basis for the charter of liberties and privileges adopted in the colony of New York in 1683, which provided "that every freeholder within this province, and every freeman in any corporation shall have his free choice and vote in the Electing of representatives, ... and by freeholder is understood everyone who is so understood according to the Laws of England."[5] The notion of vested privilege remains even today in England the theoretical basis

[4] 2 Ld. Raymond 938, in 1 Smith's *Leading Cases*, 9th Amer. ed., p. 480.
[5] Bishop, *History of Elections in the American Colonies*, p. 20.

of the suffrage. McCrary in his *Law of Elections*,[6] declares: "In England the right to vote is a vested right attached to and inseparable from an estate of freehold, and the right can no more be taken away than the freehold itself." The extension of the suffrage in England has not been accompanied by any other more modern theory; the public law, in this respect is not now, and never has been, the application of the abstract, natural right theory of voting. The suffrage at present does not rest upon any single broad principle; it continues to be attached to a number of special statuses. Where a man is possessed of more than one status, it is significant that he enjoys more than one vote. This theory is chiefly responsible for the various systems of weighted or plural voting, such as the three-class systems in Prussia. It is the basis for the distinctions between tax-paying women and other women, between widows and spinsters on the one hand, and married women on the other, which certain schemes of woman suffrage embody. Property qualifications for voting, wherever they have existed, are rooted in this theory of vested privilege.

The third theory of the suffrage, that voting is a natural right, though directly connected with the establishment of the modern constitutional regime, can be traced in its origin far back into the middle ages. Connected, as it is, with the doctrines of natural law, social compact and popular sovereignty, its germ is indeed to be sought in Greek philosophy and Roman law. It is clearly suggested by Thomas Aquinas. Resting his entire theory on natural law, he maintained that the supreme power belongs to the multitude as a whole, or to that one who represents the multitude. Power is originally in the hands of all, and especially vested in one or more who are accounted the representatives of the multitude. It is therefore by the title of representative of the multitude that a prince or magistrate can enact laws. If a people has a right to make a king, it has the right to depose him. In performing his function unfaithfully the king has deserved that the pact between himself and the people be not observed by them. He goes even farther in declaring that in a properly organized state, it is necessary that all should have a share in the government.[7] Marsiglio of Padua, in defending monarchy as a type of government, insists upon an election as the only legitimate basis for this institution. The prince is put at the head of the state through the act of election by the community of the people, and all his authority

[6] §9.

[7] Cf. Janet, *Histoire de la science politique*, i: 384-387.

he has received from them. As the supreme power in the state, the people have the right to make all the laws. In case of dispute the majority must rule. In the assembly every man has the right to propose laws; though legislative initiation may for practical reasons be delegated to a body of wise men who lay their proposals before the assembly of the people for their discussion and approval. The prince is merely the executive agent of the lawmaking body, and his action is at all times limited by law. He may, if he oversteps the powers conferred or violates the laws, be deposed by the lawgiving people. The same ideas are found in William of Ockam. Originally, he holds, all men were in a state of nature, and lived according to natural and divine law. After the Fall, it became necessary to constitute the state, which was accomplished through a general compact. A prince was elected and the people bound themselves to obey him so long as he ruled for the common good. The people, however, retained the right of lawmaking, since this belongs to all mortals on the principle that what touches all must be acted on by all. They may delegate this power to agents, but these are confined within the authority which has been distinctly granted. A prince upon whom such power has been conferred may, if he transgresses the limits of his authority or violates natural or divine law, be deposed. The same principles which by natural law lay at the foundation of the state are equally applicable to the church.[8]

During the conciliar period, in the fifteenth century, still more definite expressions of the theory of an abstract right to vote are to be found. Nicholas of Cues perhaps most fully elaborates this idea. All earthly power, he holds, emanates ultimately from God, but the organ for this divine manifestation is the will of the community, which is looked upon as God-inspired. The divine character of government is revealed in the voluntary consent of the governed. Thus all *jurisdictio* and *administratio* are based upon *electio*. A voluntary delegation by the community, or a majority of the people, is the only basis for the exercise of power and authority. Only such a ruler as has been freely elected is a rightful bearer of the common will. Only by recognizing himself to be the creation of the whole does a ruler become the father of its several members. Even within the scope of his powers a ruler is subject to constant supervision by the people, and they have the right

[8] Sullivan, *Marsiglio of Padua and William of Ockam*, in *Amer. Hist. Rev.*, ii, pp. 409–426, 593–610.

to depose him in case of his transgressing the laws which they have laid down. Lawmaking by its very nature is reserved to the community, since the obligatory force of all laws rests in the common consent of those subject to the laws. All this is the imprescriptible and inalienable right bestowed by the law of God and nature. The government of the church rested upon the same basis as the state. Election was the medium by which the general will, the *communis consensus*, was expressed. From the pope himself to the lowliest parson, all church officials ought to be elected either directly or indirectly by the body of the church.[9]

In the writings of the Monarchomachi of the sixteenth century, such as Hotman's *Franco-Gallia*, the *Vindiciae contra Tyrannos* and Buchanan's *De Jure Regni apud Scotos*, in Hooker's *Laws of Ecclesiastical Polity*, and Althusius's *Politica Methodice Digesta*, as also in Calvin's *Institutes* are to be found various elaborations of the doctrines of social compact and popular sovereignty, with occasional suggestions in the direction of an abstract right to vote. But on the whole these writers are feudalistic and aristocratical in their tendency, not equalitarian. They desired to establish the "estates state" upon a substantial theoretical basis. Their writings must not be viewed as constituting the foundation of the popularly-based, modern, constitutional state. No more definite statement of the theory of a natural right to vote is found before the seventeenth century than that of Nicholas of Cues.

The seventeenth century in Englandis a long period of political travail in which the modern constitutional state was born. It is in this era that the doctrine of abstract right is first fully developed and bears fruit in actual political institutions. The absolutism of the Tudors had accomplished the work of crushing out or completely subordinating all the various elements of the "estates state" to the state itself. The state was sovereign. The dominant question of the Stuart period was, therefore, not as to the amount of independence or subjection which each of the rival corporate elements in the state should bear toward the others. It was whether parliament or king should be recognized as the ultimate and finally authoritative organ of the government in the sovereign state. In asserting its claim to political supremacy, parliament had recourse to the musty precedents of the earlier "estates state" period. Against the *jure divino* theory of monarchical absolutism, to which the courts were properly enough inclined to give effect, Eliot, Pym and Coke constructed a theory of parliamentary supremacy upon

[9] Gierke, *Political Theories of the Middle Age*, pp. 47–57.

the basis of *Magna Charta, Confirmatio Chartarum,* the statute *de tallagio non concedendo* and the dicta of Bracton. That their doctrine had a certain substantial historical basis made it none the less revolutionary. Absolutism had intervened, and though they thought they were restoring the conditions of a precedent age, they were in reality creating a novel constitutional regime. This becomes obviously and consciously patent in the period of the Commonwealth, when men boldly cut loose from the thraldom of medieval ideas and undertook to construct avowedly new political institutions to meet the necessities of a new age. The movement was radical and extreme, but in the political discussions that accompanied it are to be found some of the most significant, because among the earliest, expressions of the political theory of the modern constitutional state.

The popular movement in the seventeenth century was quite as much religious as political. The ideas of the Puritans, and especially the Independents, concerning church organization were capable of, and early received, a political application. Starting from the premise of natural law and a social compact, Robert Browne, the founder of Congregationalism, defined a church as "a company or number of Christians or believers, which, by a willing covenant made with their God, are under the government of God and Christ, and keep his laws in one holy communion."[10] The right of each member to participate in church administration was a logical conclusion from this contractual basis of the church. Robinson states the principle clearly: "The elders, in ruling and governing the Church, must represent the People and occupy their place. It should seem, then, that it appertains unto the People—unto the People primarily and originally, under Christ—to rule and govern the Church, that is, themselves."[11] And again, speaking of the "proper subject of the power of Christ," he says: "The papists plant it in the pope; the Protestants in the bishops, the Puritans, as you term the reformed churches and those of their mind, in the presbytery; we, whom you name Brownists, put it in the body of the congregation, the multitude called the Church."[12] Cartwright and Travers insisted upon the election of ministers by the congregation.[13] Thus by the time

[10] *Booke which Sheweth,* Def. 35, quoted by Scherger, *Evolution of Modern Liberty,* pp. 122, 123.

[11] *A Just and Necessary Apology,* (1625), quoted by Scherger, *op. cit.,* p. 123.

[12] *Justification of Separation,* quoted by Scherger, p. 122.

[13] Vid. Gooch, *History of English Democratic Ideas in the Seventeenth Century,* p. 49.

the Pilgrims sailed for the new world, the doctrines of the social compact, the supreme authority of the congregation, and the participation of all members in the government of the church were accepted and recognized principles. What more natural than that these ideas should be transferred to the political sphere when a new state was to be organized, which was in fact the congregation on its political side? The Mayflower compact merely embodies a political version of these doctrines. It is significant that servants and common sailors participated. The governor and council of Plymouth were elected by the votes of all, and were responsible to the popular assembly consisting of all male colonists of full age. The social compact theory, with the implication that all who have covenanted together to form the government have a right to vote, was the theoretical basis of the Fundamental Orders of Connecticut. In a sermon at Hartford, Hooker declared: "The choice of public magistrates belongs unto the people by God's own allowance. They who have the power to appoint officers and magistrates, it is in their power also to set the bounds and limitations of the power and place unto which they call them. And this, in the first place, because the principle of authority resides in the free consent of the people."[14] The government of Rhode Island, under its charter, was declared to be "democratical; that is to say, a government held by free consent of all or the greater part of the free inhabitants."[15]

Opposed to the Independents, the Presbyterians, following Calvin, held to a more aristocratic theory of church government. Authority and power in the church was attached to a particular status. It was not to be shared by all. The political application is made by Baillie, who declared that "The popular government bringeth in confusion, making the feet above the head."[16] "The Independents," wrote Clement Walker, "have cast all the mysteries and secrets of government before the vulgar, and taught the soldiery and the people to look into them and to ravel back all governments to the first principles of nature. They have made the people so curious that they will never find humility enough to submit to a civil rule."[17]

It was in the discussions of the council of the Commonwealth army, in connection with the submission of the Agreement of the People,[18]

[14] Quoted by Borgeaud, *Rise of Modern Democracy*, pp. 123, 124.
[15] Quoted by Gooch, *op. cit.*, p. 86.
[16] *Ibid.*, p. 179.
[17] *Ibid.*, pp. 169, 170.
[18] In Gardiner, *Constitutional Documents*, 2d ed, pp. 333–335.

that we find the clearest expressions of the radical theories of government, and in particular of an abstract right to vote; and, in opposition, the patrimonial or vested privilege theory is also ably stated. This document, the work of the radical leaders of the army, the so-called Levellers, was drawn up and signed October 9, 1647. Among other demands, it contains the following: "That the people do, of course, choose themselves a Parliament once in two years." It was about this particular clause that the controversy raged. The Levellers, the authors of the Agreement, based their agitation upon natural law, which was at this time receiving novel and extended applications. Maintaining that the people had inherent, natural rights, "due to them by God's law of nature," they insisted that "It is equal, necessary, and of natural right, that the people, by their own deputies, should choose their own laws."[19] It is true that they occasionally speak of their "birthright," a term which suggests the vested privileges of the "estates state," and they fall into the confusion of joining their theory of abstract rights with that of vested privilege, or "native rights," as when they assert that "It is the first principle of a people's liberty that they shall not be bound but by their own consent; and this our ancestors left to England as its undoubted right, that no laws to bind our persons or estates could be imposed upon us against our wills, and they challenged it as their native right not to be controlled in making such laws as concerned their common right and interests."[20] But their chief reliance was upon an abstract right of nature, and, as the discussion proceeded, they abandoned the appeal to vested privilege, which was used as an effective weapon against them by their more conservative opponents.

The issue is clearly drawn in the council of the army when the Agreement was read and considered. Ireton demanded what was meant by "the People of England," a question which might very well be put to progressive political reformers in our own country at the present time. He wished to know if it referred to "those people that by the Civill Constitution of this kingedome, which is originall and fundamentall, and beyond which I am sure noe memory of record does goe" have the right of election, or to others.[21] To this question Colonel Rainborow's response is explicit: "The poorest hee that is in England hath a life to live as the greatest hee . . . . . every man that is to live under

[19] *The Leveller*, in *Harleian Misc.*, iv, pp. 545, 547, quoted by Scherger, p. 128.

[20] *Clarke Papers*, i, preface, pp. lxi, lxiii; *The Leveller*, as above, p. 543, quoted by Scherger, p. 130.

[21] *Clarke Papers*, i, pp. 299, 300.

a Governement ought first by his owne consent to putt himself under that Governement; . . . . . the poorest man in England is nott att all bound in a stricte sence to that Governement, that hee hath not had a voice to putt himself under."[22] Rainborow insisted:[23] "I doe heare nothing att all that can convince mee why any man that is borne in England ought nott to have his voice in Election of Burgesses. Itt is said, that if a man have nott a permanent interest, hee can have noe claime, and wee must bee noe freer than the lawes will lett us to bee, and that there is noe Chronicle will lett us bee freer than that wee enjoy . . . . . I doe thinke that the maine cause why Almighty God gave men reason, itt was, that they should make use of that reason, and that they should improve itt for that end and purpose that God gave itt them. And truly, I thinke that halfe a loafe is better than none if a man bee an hungry, yett I thinke there is nothing that God hath given a man that any else can take from him. Therfore I say, that either itt must bee the law of God or the law of man that must prohibite the meanest man in the Kingdome to have this benefitt as well as the greatest. I doe nott finde anythinge in the law of God, that a Lord shall chuse 20 Burgesses, and a Gentleman butt two, or a poore man shall chuse none. I finde noe such thinge in the law of nature, nor in the law of nations." He pays his respects to the theory of vested privilege as follows: "As for this of Corporations itt is as contrary to freedome as may bee. For, Sir, what is itt? The Kinge hee grants a patent under the Broad-seale of England to such a Corporation to send Burgesses, hee grants to [such] a Citty to send Burgesses. When a poore, base, Corporation from the Kinge['s grant] shall send two Burgesses, when 500 men of estate shall not send one, when those that are to make their lawes are called by the Kinge, or cannott act [but] by such a call, truly I thinke that the people of England have little freedome."

In answering Rainborow's argument, Ireton clearly displays the fallacies of the theory of abstract right. "Give mee leave," he says,[24] "to tell you, that if you make this the rule I thinke you must flie for refuge to an absolute naturall Right, and you must deny all Civile Right; and I am sure itt will come to that in the consequence . . . . For my parte I thinke itt is noe right att all. I thinke that noe person hath a right to an interest or share in the disposing or determining of the affaires of the Kingdome, and in chusing those that shall determine what

[22] *Ibid.*, p. 301.
[23] *Ibid.*, pp. 304–306.
[24] *Ibid.*, p. 301, 302.

lawes wee shall bee rul'd by heere, noe person hath a right to this, that hath nott a permanent fixed interest in this Kingedome; . . . . . that is, the persons in whome all land lies, and those in Corporations in whome all trading lies. This is the most fundamentall Constitution of this Kingedome, which if you doe nott allow you allow none att all."

Major Rainborow (to be distinguished from the Colonel) sounds a very modern and familiar note in the statement, that "The cheif end of this Governement is to preserve persons as well as estates, and if any law shall take hold of my person itt is more deare than my estate."[25] Pettus more explicitly developed the theory of an abstract right to vote from a social compact basis. "Every man," he said, "is naturally free; and I judge the reason why men when they were in soe great numbers [chose Representatives was] that every man could nott give his voice; and therefore men agreed to come into some forme of Governement, that they who were chosen might preserve propertie. I would faine know, if we were to begin a Governement, [whether you would say] 'you have nott 40 s. a yeare, therfore you shall not have a voice.'"[26] Again he declared: "If there is a Constitution that the people are not free that should be annull'd. Butt this Constitution doth nott make people free, that Constitution which is new sette uppe is a Constitution of 40 s. a yeare."[27] He admitted that apprentices and servants, and those who take alms, should be excluded, because they depend upon the will of other men whom they would fear to displease. They have in effect no will of their own. Another basis for asserting an abstract right to vote was advanced by Captain Awdeley, who said: "Itt is the right of every freeborne man to elect, according to the rule, Quod omnibus spectat, ab omnibus tractari debet, that which concernes all ought to bee debated by all."[28] On the other hand, Cromwell, who took little part in the discussion, held to Ireton's opinion. Rainborow's and the army's view would lead to anarchy, "for where is there any bound or limitt sett if you take away this [limit] that men that have noe interest butt the interest of breathing [shall have no voices in elections]?"[29]

In America the prevalent theory has been that of an abstract right to vote, resting on the premises of social compact and popular sovereignty. It comes clearly to expression in the period of the American

[25] *Ibid.*, 320.
[26] *Ibid.*, 312.
[27] *Ibid.*, 336.
[28] *Ibid.*, 340.
[29] *Ibid.*, 309.

Revolution, as part of the general doctrine of natural rights which underlay that movement. In a "Declaration of the Rights of the Colonists as Men, as Christians, and as Subjects," which was written by Samuel Adams and presented to a town meeting in Boston on November 20, 1772, by James Otis, "The establishment of the legislative power, which itself cannot subvert the fundamental natural law of the preservation of society," is asserted to be one of the rights which no man can either relinquish or take away from others.[30] The principles enunciated in the Declaration of Independence, that governments derive "their just powers from the consent of the governed," and that "it is the right of the people to alter or abolish" tyrannical governments and institute new governments, may be taken to imply the theory of an abstract right to vote. A more definite statement is found in a resolution of a convention held in Ipswich, Massachusetts, in 1778, to consider the proposed constitution for that commonwealth. "All the members of the State," it asserted, "are qualified to make the election, unless they have not sufficient discretion, or are so situated as to have no wills of their own."[31] The early State constitutions and bills of rights contain numerous expressions of the theory of an abstract right to vote, but generally they are modified and confused by suggestions of the vested privilege theory. The Virginia bill of rights declares "That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; that all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them; . . . . . that when a government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter or abolish it, in such manner as shall be judged most conducive to the public weal; that all elections ought to be free, and that all men having sufficient evidence of permanent common interest with, and attachment to the community, have the right of suffrage." The Massachusetts constitution of 1780 declares that "The body politic is formed by a voluntary association of individuals; it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people that all shall be governed by certain laws for the common good." And in the bill of

[30] Quoted by Scherger, *op cit.*, pp. 186–188.

[31] Quoted by Ostrogorski, *Rights of Women*, p. 53, note.

rights it is further declared that "All elections ought to be free; and all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers and to be elected for public employments." The New Hampshire constitution of 1784 declares: "All men are born equally free and independent; therefore, all government of right originates from the people, is founded in consent, and instituted for the general good. All men have certain natural, essential, and inherent rights . . . . . All power residing originally in and being derived from the people, all the magistrates and officers of government are their substitutes and agents, and at all times are accountable to them. All elections ought to be free and every inhabitant of the state having the proper qualifications has an equal right to elect and to be elected into office."

The theory of an abstract natural right to vote comes out clearly in France during the revolutionary period. Montesquieu had declared that "All the inhabitants . . . . . ought to have a right of voting at the election of a representative, except such as are in so mean a situation as to be deemed to have no will of their own."[32] The writer has been unable to find any explicit assertion of an abstract right to vote in Rousseau, but it is a necessary implication and consequence of his social compact theory, and is at least strongly suggested in words. Scherger, in his brilliant little work on *The Evolution of Modern Liberty*[33] holds that "Nothing could be more erroneous than to attribute to Rousseau's influence the formation of the French Declaration of the Rights of Man . . . . . Rousseau's political philosophy, which aimed at securing freedom and equality, was destructive to individual rights. He has the individual surrender all his rights, without retaining a remnant of them, to the sovereign people or *volonté générale*." The writer is inclined, on the whole, to agree with this view. But it is obvious that there is one exception, viz. the right of the individual to an equal participation in the formation of the *volonté générale*. That is not surrendered. That is in fact the basis and essence of the whole social compact theory. Rousseau would not have assented to a declaration of the rights of man including the usual rights to the protection of life, liberty and property, to freedom of expression of opinion, and to freedom of association. But he must have agreed to the right to vote, not as precedent to, but as a consequence of, the social compact, and an

[32] *Esprit des lois*, bk. xi, ch. 6.
[33] Page 150.

essential corollary of popular sovereignty. "From the counting of the votes," he says, "is obtained the declaration of the general will . . . This supposes, it is true, that all the marks of the general will are still in the majority."[34]

Rousseau's disciples, in 1789, were not so logically consistent. Sieyes,[35] his chief exponent at the time of the Revolution, not only developed the doctrine of natural rights, which was really no part of his master's system, but also grafted upon that system the principles of representation, to which Rousseau was radically opposed on theoretical grounds. On the other hand, he did not accept the notion of an abstract right to vote. He holds that a constitution, being necessary for the government of a state, its first need is a constituent body. But all citizens are not qualified to participate in the formation of such constituent body, nor of the constituted bodies which it may establish. He distinguishes between *droits passifs*, or those for the preservation and development of which the state is founded, and *droits actifs*, or those by which society or government is actually established. This distinction corresponds very closely to that between civil and political rights, as we understand the terms. All citizens, Sieyes maintained, possess the former, but not the latter. Women, children, foreigners, those who contribute nothing toward the maintenance of the public establishment do not share in the rights of constituting government. Hence his distinction between *citoyens passifs* and *citoyens actifs*. He adheres to the theory of social compact and the *volonté générale*, which he holds is an emanation of the nation, i. e., of all the people. But "the exercise of a public function is not a right but a duty, ... and the officers of the nation have beyond the citizens only greater duties." Here we get the first suggestion—merely a suggestion, for it is left entirely unelaborated—of a new theory of the suffrage which is to gradually encroach upon the theory of abstract natural right, the theory that voting is a public office or function of government.

The natural right view was, however, strongly defended by most of the leaders of the revolution. As early as 1787, Condorcet had declared:[36] "We would have a constitution, the principles of which are solely founded on the *natural* rights of man previous to social institutions."

[34] *Social Compact* (Social Science Series), pp. 200, 201.

[35] Cf. on the Po itical Theory of Sieyes, Walch, *La declaration des droits de l'homme et du citoyen et l'assembleé constituante*. pp. 84–86.

[36] *Lettres d'un Bourgeois de New Haven à un Citoyen de Virginie*, quoted by Ostrogorski, *Rights of Women*, pp. 25, 26.

"One of these rights we consider to be that of voting for common interests either personally or by freely elected representatives. Is it not in their character of sensible beings, capable of reason and with moral ideas, that men have rights? Women, therefore, should have absolutely the same . . . . . Either no individual member of the human race has any real rights, or else all have the same; and whoever votes against the rights of another, no matter what his religion, his color or his sex may be, has henceforth abjured his own." Thomas Paine, in his *Rights of Man*,[37] declares that "The representatives of the nation [in France] which compose the National Assembly, and who are the legislative power, originate in and from the people by election, as an inherent right in the people." And he contrasts this with the basis of representation in England which consists in royal patents, and embodies a grant or boon. The declaration of rights of 1789 asserts that "The law is the expression of the *volonté générale*. All the citizens have the right of concurring personally or by their representatives in its formation."[38]

The electoral law of 1789, which came to be embodied in the constitution of 1791, did not give full application to the theory of an abstract right to vote which was so generally held. The moderates in the national assembly secured the adoption of a scheme by which territory and the amount of taxes paid, as well as population, should determine the number of representatives which each department should return; and the suffrage was restricted to those citizens who paid a certain amount of direct taxes. Against this system Bengy de Puyville fulminated in vain. Proceeding in his argument from a natural law standpoint, he urged that representation was an inherent right of every citizen, belonging to him by nature. Population alone should constitute the criterion for the distribution of seats. Robespierre argued from the declaration of rights, which had already been adopted, that all citizens had a right to participate in every stage of representation. Sovereignty belonged to the people, to all the individuals making up the people. Thus every individual has a right to a share in the framing of laws and in administration. If not, he asserts, it is not true that all men are equal in rights, nor that every man is a citizen. If he who pays a tax equivalent to one day's work has less rights than he who pays one equivalent to three days work, then the person who pays a tax equiva-

[37] Page 62.
[38] Art. vi.

lent to ten days work must possess still greater rights, and so on up the scale.[39]

The radicals soon gained control of the National Assembly and the theory of an abstract right to vote received full application. In the electoral law passed on August 11, 1792, for the election of the national convention, the assembly proceeded from the view that it did not possess the competence to subject the sovereign people to regulations concerning the exercise of its rights of sovereignty, but merely suggested and requested that the elections take place at the same time and according to uniform principles.[40] With the establishment of the convention the abstract right of every individual, even including certain classes of foreigners domiciled within France, to vote was completely recognized, and universal, adult, male suffrage was thus established.

The directorial constitution of the year 1795 marks a reaction from the radical point of view, and contains similar limitations upon the suffrage to those enforced by the constitution of 1791. In reporting the proposal, Boissy d'Anglas characterized the constitution of 1793 as the organization of anarchy. Advantage should be taken of experience and *le gouvernement des meilleurs* should be established. The theoretical position of the committee was, however, confused. They declared that voting was not a function but a right, yet conditioned its exercise upon the payment of a public contribution. Thomas Paine led the opposition to the adoption of these restrictions, and maintained that each individual held his right of himself and from nature, and that no one had the right to deprive him of it. The refusal of the right to Frenchmen not inscribed upon the direct tax-roll was to treat the majority of citizens as helots. To this Lanjuinais replied that political rights are not veritable rights, and that if Paine's view were true it would be necessary to admit the insane, idiots, women, children and foreigners to the franchise. In spite of the committee's contradictory position, it is in this discussion that the idea that the suffrage is a public function of government, which presumes a capacity, begins to break through.[41]

The theory of an abstract right to vote has played a rôle, the importance of which would be difficult to exaggerate, in the determination of many of the most important problems of constitutional government.

[39] Cf. Meyer, *Wahlrecht*, pp. 50-58; Duvergier de Hauranne, *Hist. du Gouv. Parl. en France*, i, 120, 121; Buchez et Roux, *Hist. parl de la Rev.*, iii, 213; *Archives Parlementaires*, Bd. ix, p. 479, Bd. xxix.

[40] Meyer, *Wahlrecht*, pp. 64, 65.

[41] Duvergier de Hauranne, *op. cit.*, i, 340, 350; Meyer, 70, 71.

It continues today to be the accepted view of the suffrage among the masses of the people,[42] and is an implied justification and basis of many of the political reforms connected with the electorate which have been achieved or are now being agitated. It is necessary to remind ourselves that untenable political dogmas have frequently served a useful end. Our whole system of international law rests, in its origin, upon the theory of natural law. The doctrine of the social compact supplied the need for a theoretical justification for the American Revolution. Our system of constitutional guarantees for individual rights has grown from the theory of abstract natural rights of the individual. The untenable doctrine of popular sovereignty has a long and notable history of achievement; it has for centuries been the most effective weapon in the hands of the champions of constitutional government. We must not, therefore, on the one hand, refuse to the doctrine of an abstract right to vote the credit of having accomplished great good because we see its fallacies, nor, on the other, accept the practical benefits which it has achieved as proof of its theoretical soundness. In the form which it has generally taken this doctrine is a consequence or corollary of the theories of social compact and popular sovereignty. These two doctrines are not necessarily connected; popular sovereignty has shown much more vitality and persistance than the social compact idea. The latter has been discarded by nearly all theoretical writers. It has ceased to play a very important rôle in popular political discussions. Popular sovereignty, on the other hand, continues to command the support of many trained political scientists, and is the generally accepted premise upon which popular discussions of political questions are still carried on. It is so directly connected with the subject of our immediate investigation that it, therefore, requires a brief examination. The writer is convinced that so long as the doctrine of popular sovereignty persists, that of an abstract right to vote will likewise continue to determine discussions of problems of electoral reform.

Sovereignty is essentially a legal conception. The idea originally developed in connection with the establishment of the national state. As the national state evolved out of the confusion and conflict of authorities of the middle ages, sovereignty came to be attributed to it, i.e., it came to be recognized as legally independent of all external control, and legally supreme with respect to all internal matters. This original

[42] "The notion," says James Bryce (*Hindrances to Good Citizenship*, p. 55), "that every man has a sort of natural right to vote is now generally diffused."

meaning of sovereignty, as the attribute of legal independence and supremacy of the state, is the only proper and correct one. It was, however, in the era of monarchical absolutism, when the king could say with a large degree of truth "*l'état c'est moi*," a natural and easy transition from the idea of the sovereignty of the state to the idea of the sovereignty of the monarch who embodied all the power and authority of the state. Sovereignty thus came to be located in the head of the state. When constitutional government succeeded monarchical absolutism, parliamentary bodies arrogated to themselves this attribute of sovereignty. Instead of an attribute of the state, sovereignty came to be treated as the attribute of a particular organ of government. This theory could not, however, long claim general support. The elective character of parliamentary bodies was itself proof of their dependence. The difficulties are scarcely less insuperable if, instead of the ordinary constituted legislative bodies, the constituent constitutional convention be taken as sovereign. It too is dependent upon election. It too is not an original source of power but derives its authority from some ultimate source. With English writers a distinction was made between legal and political sovereignty. Parliament was said to possess only legal sovereignty. Political sovereignty was attributed to the people. This distinction has not been generally recognized outside of England, but sovereignty without distinction has been widely ascribed to the people.

But who are "the people" in whom sovereignty resides? The attempt to answer this question immediately discloses the utter fallacy of the whole doctrine. Is the people the electorate, which choose the legislative and perhaps the executive agents of the government? This is sometimes assumed to be the case. But the electorate is not legally supreme. It is subject at every turn to laws which it has no share in forming. Though it chooses the legislative body it is in turn determined by that body. What functions it shall perform and how it shall perform them is all a matter of law, statutory or constitutional. The legal power which it exercises is just as much derived, just as truly not original, as that of the constituted and constituent legislative bodies. The difficulties of this solution have often led to ascribing sovereignty to the entire mass of the people, the entire populace; and in reaching this conclusion, the social compact theory has greatly assisted. But here a different kind of difficulty is found. The people in this sense is certainly not legally determinable. In this broad meaning, the people is not a legal, but a sociological, concept. The people certainly influence, and frequently determine, political action, but it is not through

legal means—it is through public opinion. The people's will is social, not legal, will. It may be admitted that in the modern state the fundamental requirement is that the legal agencies of government shall as adequately as possible express the people's will. But to determine what the people's will is recourse must be had to all the agencies of public opinion. A general election is a fairly safe index of the will of the people, but it is by no means entirely satisfactory. The press and the platform in all their various forms and manifestations are just as truly organs of public opinion as the electorate. But even were it admitted that the electorate is the highest authoritative organ of public opinion, that does not constitute it the sovereign; it is, like the legislative and executive agencies of government, a legally constituted organ of the state. In imputing sovereignty to the mass of the people, the transition is made from the socio-psychological to the legal domain. It is because this step is taken without appreciation of its significance, or real nature, that so much confusion exists with respect to the whole subject of the suffrage. It may be admitted that the ultimate socio-psychic impetus to political action in the modern state comes from the people, but this is not sovereignty; this is not exercising a legal supremacy. The people can not be said to be the supreme will-forming power in the state, because the state is a legal entity; its will is legal will, and this the people who are not a legal entity, nor even legally determinable, are quite incapable of forming. On close analysis, the so-called sovereignty of the people is seen to consist in three things: *first*, revolution, which is the ultimate extra-legal guarantee or sanction of government; *second*, the tacit acquiescence by which governments or constitutions are accepted, which is likewise extra-legal and psychological: *third*, public opinion, which is also an extra-legal and psychological means of control over the government.

The state is a juristic personality. Its will is legal, corporate will, like that of any private corporation. Who, it may be asked, is sovereign in a railway corporation? the president of the company? the board of directors? the body of the stock-holders? The answer is manifestly that no one of these is sovereign. All are organs for the government of the corporation, but its will is corporate will to which each and all contribute their quota. They may be, and often are, moreover, controlled by extra-legal influences. Public opinion has been known to operate at times even upon railway officials. Yet were this, in the golden age which some seers dimly discern in the future, to become the dominant influence, no one would be bold enough to suggest that the

public were the supreme *legal* will-forming body in such corporations. It would still be absurd to maintain that the regulations of service, the orders by which various kinds of freight are classified, the decrees in regard to rates were legally ordained by the public. Yet this is exactly what we hear on every hand in connection with the state and its activities. The double meaning of the term "people" is the source of the confusion. The broad masses of the people are identified with the electorate, and sovereignty is imputed to this double headed monstrosity, which displays on the one side the form of a simple organ of government, and on the other the amorphous aspect of a socio-psychic association of human beings. Nor is the difficulty removed by describing the people's sovereignty as *political*. Political action is either legal, in which case the English writers have two legal sovereigns on their hands—a manifest absurdity; or it is psychological, in which case it is not and cannot be described as sovereign, which, if it means anything, means legal. The only consistent and rational solution is to treat the electorate as merely one of the organs of government, and the people as a distinct ultra-legal, sociological source of control.

The confusion of the electorate and the people, and the assumption that electoral action is the sovereign action of the state, with the implication that in voting the elector exercises an inherent and abstract right of sovereignty, has never been more noticeable than in the recent political campaigh. The able chairman of the Progressive national convention in his brilliant keynote speech declared: "The rule of the people means that when the people's legislators make a law which hurts the people, the people themselves may reject it. The rule of the people means that when the people's legislators refuse to pass a law which the people need, the people themselves may pass it. The rule of the people means that when the people's employes do not do the people's work well and honestly the people may discharge them exactly as a business man discharges employes who do not do their work well and honestly. The people's officials are the people's servants, not the people's masters." The Progressive platform contains the provision, which we are authoritatively informed was drafted by the deans of two of our greatest law-schools:[43] "That when an act passed under the police power of the State, is held unconstitutional under the state constitution by the courts, the people, after an ample interval for the deliberation, shall have an opportunity to vote on the question whether they desire the

[43] Cf. *Saturday Evening Post*, October 26, 1912.

act to become a law notwithstanding such decision." And the standard-bearer of the Progressive party himself has said: "We say that questions of fundamental justice are for the decision of the people themselves—for nobody else—and that in these matters the will of the people, deliberately expressed after full consideration, is to override the will of any or all of the servants of the people and is itself to determine what the fundamental law is to be. Therefore we insist that the people must have, wherever necessary, the right to a referendum as to whether they will accept or reverse the construction of the courts in a given case affecting social justice."[44] In all these statements is it not clear that the doctrine of popular sovereignty is made the basis of a demand for an enlargement of the functions of the electorate, the assumption being that the people and the electorate are identical? The initiative, the reverendum, the recall and the recall of judicial decisions are here not urged by the ordinary arguments of political expediency but are demanded as essential incidents to popular sovereignty and the abstract right of the individual to vote.

The demand for woman suffrage is often urged on similar grounds. The agitation for woman suffrage still too frequently takes the form of a demand for women's rights. "It certainly seems," says the last president of the American Bar Association,[45] "as if women were entitled to self-government as well as men. It is the Jeffersonian idea, and I believe it to be the true one, that all men are entitled not merely to wise government, not merely to honest government, but to self-government." What does this mean, if not that all individuals have an abstract right to vote? Any attempt to establish educational or moral qualifications for voters, or to withdraw from the suffrage classes, such as government employes, whose participation may prove inimical to general welfare, is immediately met by the assertion of each and every individual to an abstract right to vote as a corollary to popular sovereignty. The theory of an abstract right to vote implies the principle of majority rule. Proposals for proportional and minority representation run counter to this idea, and their adoption has been delayed and impeded by the widely disseminated notion of the right of a majority to rule. The abstract right theory also generally favors direct as against indirect elections. It is the life and soul of the doctrine of the imperative mandate, and the view that representatives are subject to the instructions of their constituents.

[44] *Ibid.*

[45] In his address before the Association in Milwaukee, 1912.

Dominant still in the field of popular political discussion, the abstract right theory of the suffrage has ceased to command the general support of serious students of political science. In academic circles a fourth doctrine is gradually coming to be accepted, that voting is a function of government. The voter does not realize a primordial right of man when he casts his ballot; he performs a public governmental office. The electorate is not the people; it is an organ of government, established, organized and determined by the laws, by which it can, moreover, be limited, expanded or entirely abolished. There is no more excuse for talking of natural fundamental rights in connection with the electorate than in connection with the legislature. Both are organs of government; the size of the one as the size of the other, the character and organization of the one as of the other are matters of pure political expediency to be ordained by the laws, subject to alteration at any time. "If this body," says Professor Dealey,[46] "instead of being referred to as the 'sovereign people,' should be treated, from the legal standpoint at any rate, as a governmental agency, clearness in discussion would be gained." Professor Ritchie asserts[47] that "The suffrage, by all thoughtful persons at least, is regarded as a means to the working of the constitution; and the right of voting is obviously a right created by the law (whether special constitutional law or ordinary law), and cannot intelligibly be represented as a right prior to and independent of law. . . . . On whom the suffrage should be conferred is a matter not to be stettled *a priori*, but by the reference to the particular circumstances of the country." Says Ostrogorski,[48] "As to political rights, since participation in the government of the country—which is their very essence—presupposes a special capacity, and is by no means an integral part of human personality, nor requisite to its development, we judged them to be not an absolute, but a relative right, a creation of law. . . . . The government of the commonweal, not being the personal property of any one, neither a *caste* privilege, nor yet an hereditary right, is essentially an office performed in the general interest. . . . . Thus the question of admission to, or exclusion from, the government of the country, is independent of the principles of Law, and confined wholly to the sphere of politics." Bluntschli has written:[49] "The suffrage in the state and for political purposes is not a natural

[46] *Our State Constitutions*, Supplement to the *Annals of Amer. Acad.*, 1907, p. 6.
[47] *Natural Rights*, p. 255.
[48] *Rights of Women*, pp. 191, 192.
[49] *Politik*, p. 421.

right of man, but a political right derived from the state and serving its ends. It does not exist outside the state nor in opposition to it. Not as men, but as citizens do the electors exercise this right. They have this right not of themselves, not because their personal existence and development demands it, but they have received it from the state's constitution and exercise it in the service of the state." Georg Meyer[50] asserts that the self-evident right of every man to vote has today scarcely a defender. It has been superseded along with the theory of natural rights of the individual. In scientific literature, especially in Germany, the predominant view is that which looks upon the suffrage as a public function. President Cleveland clearly expressed this view, in saying[51] that "Your every voter, as surely as your Chief Magistrate, under the same high sanction, though in a different sphere, exercises a public trust." Though still holding the doctrine of popular sovereignty, some American legal writers, as well as some of our courts, have recognized the functional character of the suffrage. The suffrage, says Judge Jameson,[52] "is not a right at all; it is a duty, a trust, enjoined upon, or committed to, some citizens and not to others." And again he declares: "Within the sphere allotted to the electors in the scheme of government, they constitute a strictly representative body. But it is only one of a number of such bodies." The supreme court of Maryland has stated its views as follows:[53] "The right of suffrage is not an original, indefeasible right, even in the most free of republican governments; but every civilized society has uniformly fixed, modified or regulated it for itself, according to its own free will and pleasure, and in these United States every constitution of government has assumed, as a fundamental principle, the right of the people of a state to alter, abolish and modify the form of its own government, according to the sovereign pleasure of the people. The right to vote like the right to hold office, being thus conferred upon the voter by the sovereign will of the people, in their organic law or constitution of government, the question, upon whom it ought to be conferred, and what should constitute its boundaries and limits—in other words, what should qualify and what should disqualify—is one which the people themselves are to settle." In this opinion, it is clear, the court identifies the people with a constitutional convention, which is no less absurd than their identification with the

[50] *Wahlrecht*, pp. 411, 412.
[51] Gilder's, *Cleveland*, p. 39.
[52] *Constitutional Conventions*, §§337, 332.
[53] Anderson vs. Baker, 23 Md. 596.

electorate; but by this fiction the court manages to arrive at the correct view of the nature of the suffrage.

The conception of the suffrage as a function of government is the theoretical basis for such proposals as proportional and minority representation, the representation of interests, compulsory voting and the short ballot. The enactment of improved ballot laws and corrupt practices acts are in harmony with this view. The champions of these various measures maintain that their particular reforms will improve the character of the electorate as an organ of government. The point of view from which they proceed is that of governmental efficiency. In every case these proposals are urged on grounds of pure political expediency. The question is the same as whether in particular circumstances a legislative body should be unicameral or bicameral—how ought the organ of government to be constituted, with what functions ought it to be endowed, in order that its usefulness may be as great as possible.

Theoretically impregnable as the functional theory of the suffrage may appear, it is already threatened by a new, a fifth, conception of the nature of voting which promises to develop great strength and possibly to seriously modify, though it can scarcely supplant it. This view may be called the ethical theory of the suffrage. Based upon the Kantian postulate of human equality as the result of the moral worth of the individual, it is, unlike the functional theory, equalitarian in its spirit and tendency. It is not, however, a doctrine of natural rights. A broad doctrine of ethical equality is inherent in Kant's precept, "So act as to treat humanity in ourselves and in others always as an end, never as a means only." The moral worth of the individual human being is the source of the dignity of human life; it is what separates man by an immeasurable distance from the brute and the chattel. The enormity and the sin of slavery lies in its failure to recognize this common quality of moral worth which binds all humanity in one great brotherhood. Equal moral worth was the essence of Lincoln's idea of human equality. The ordinary civil rights to the protection of life, of liberty, of property, find their *raison d'etre* in the equal moral worth of all individuals. Moral worth is not a passive but an active quality. It embodies a capacity for action. Civil rights find their justification in the natural desire to afford the necessary means for the fullest possible ethical self-realization. They constitute the essential basis for the development of individual character. Civil rights are merely the minimum of opportunity necessary for the giving effect to the inherent

moral worth of human personality. "This", says Mazzini[54], "at all events you must have—this modicum of immunity from aggression, from plunder, from slander, and so forth. More you may acquire: that will depend on your fortunes in life. But this at all events must be yours—if your life is not to be wrecked on a perpetual and exasperating contradiction between the inward spirit of worth, that prompts to act, and the outward accidents of circumstance which deny you opportunity." The broad constructive program of social justice legislation, which is enlisting at present the best efforts of reformers, and appealing with compelling force to the minds and the consciences of the entire nation, rests in fundamental analysis upon the recognition of the moral worth of the individual human being.

But this view is not content to rest with the acquisition of civil rights for the individual. It insists upon approaching the question of political rights, and especially the suffrage, from the standpoint of individual moral worth. The point of approach of the functional school is governmental efficiency; they deem the criterion of efficiency a sufficient basis upon which to determine all questions connected with the suffrage, as all other questions of governmental organization. To this the ethical school does not assent. "Political equality", MacCunn declares,[55] "follows from the same ultimate ideas that justify equality before the Law. . . . . The right to vote can alone open up to its possesssor that sphere of public activity, which cannot be closed on him who is fit for it without contracting his life and stunting his development. We cannot respect men for the moral worth that is in them, and yet think it a final and satisfactory state of things that they should spend themselves wholly on interests that never go beyond the range of private lives." With the possible exception of religion, he asserts, "there is no means to be named beside political rights, whereby the wider interests of life may be made a vitalizing influence throughout the rank and file of democracy." "A vote, just like any civil right, is simply one more opportunity, one more instrument, whereby the potential moral worth of the man becomes the realized and practical worth of the enfranchised citizen." "Give us votes. . . . . in order that we may make men of ourselves in that larger scene that lies open to the life of active citizenship." "The ballot, indeed," says Dole,[56] "is only a piece

[54] "*Duties of Man*," *Life and Writings*, iv, ch. i, quoted by MacCunn, *Ethics of Citizenship*, pp. 10, 11.

[55] *Ethics of Citizenship*, p. 13, 14.

[56] *Spirit of Democracy*, pp. 104, 50.

of machinery. It is a method for the expression of men's manhood. Its use is not itself a natural right. The natural right is that man shall express himself in some valid form touching the interests which effect him." And again he asserts: "The mere form of asking a man's advice or opinion about the institutions to which he is subject tends to elevate his self-respect and to make him content with the working of those institutions. The practice of democracy becomes a daily discipline in goodwill."

There is no doubt that this ethical conception of the suffrage played some, though certainly not the controlling, part in the movement which secured the enfranchisement of the negroes. It has played a much more important rôle in American colonial policy. It is quite impossible to explain or justify the establishment of representative institutions in the Phillippine Islands and in Porto Rico, and the grant of the suffrage to large sections of the people of those dependencies, on any ground of governmental efficiency. This was a new departure in colonial policy and was severely criticized by exponents of administrative efficiency. The two ideals of administrative efficiency and the development of the capacity for self-government, which is equivalent to the realization of moral worth, are incompatible. In forsaking the former ideal for the latter, the United States struck a higher note of political idealism than had ever before been reached. In the British Indian councils act of 1909, the English government consciously permitted this dynamic idea to also effect, though still in a minor degree, British colonial policy. Is it a hazardous prediction that this ethical theory of the suffrage will in the future fundamentally modify the doctrine that voting is nothing more than a governmental function?

The five theories of the suffrage, whose history and general import we have sketched, all continue to influence and affect our ideas, our political discussions, our proposals of reform and our actual legislation concerning the electorate. Our theory of the suffrage is a conglomerate of them all. Tangled and confused, they offer no secure or satisfactory explanation of what we are doing or have done in this important field of public law. They afford an utterly inadequate criterion by which to judge proposed innovations. They do not in their present form constitute such a constructive agency for political institutions as it is the duty of political science to supply.